UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/834
1 August 1997

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 834

Case No. 905: KUMAR

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mikuin Leliel Balanda, Vice-President, presiding; Mr. Mayer Gabay; Mr. Julio Barboza;

Whereas, on 5 June and 16 August 1995, Unnikrishna Menon Dilip Kumar, a former staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application with the Tribunal until 31 January 1996;

Whereas, on 12 January 1996, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal, inter alia:

> "2.1 To investigate the recruitment procedures adopted by ESCAP/APCTT [the Economic and Social Commission for Asia and the Pacific/Asia and Pacific Center for Transfer of Technology] on the eve of and after its relocation [to] New Delhi, including the constitutional and statutory sanctity and bonafides of the four-member ESCAP/APCTT Selection Committee which interviewed the Applicant for the post of Junior Technical Assistant.
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> 2.2 To look into the decision of the ESCAP/APCTT Selection Committee which, motivated by prejudice and influenced by

extraneous factors, disqualified the Applicant and him alone from among all the former staff members who wished to relocate [to] New Delhi;

2.3 To order the rescission of the decision by ESCAP/APCTT not to rehire the Applicant for the Junior Technical Assistant's position;

2.4 To order the Applicant's reinstatement in ESCAP/APCTT at a grade and level commensurate with his qualifications and experience and worked out retrospectively from the grade/level he last held at the Centre;

2.5 To order the payment of a suitable indemnity to the Applicant as compensation for the monetary loss suffered by him on account of being out of [a] job for the past two years and to make amends for the mental agony he was forced to go through;

..."

Whereas the Respondent filed his answer on 22 May 1996;

Whereas the Applicant filed written observations on 17 June 1996;

Whereas the Applicant filed additional observations on 30 May 1997;

Whereas, on 17 July 1997, the Tribunal requested the Respondent to provide it with additional information, which the Respondent did, on 28 July 1997;

Whereas, the facts in the case are as follows:

The Applicant entered the service of ESCAP/APCTT, Bangalore, India, on 1 January 1988, as a Publication Clerk, on a six month, fixed-term contract, at the BG-5, step V level. The Applicant's appointment was extended for further fixed-term periods, in that capacity, through 30 June 1993 when the Applicant separated from service. The Applicant's performance was rated "very good" for the

periods 1 January 1988-31 December 1988, 1 November 1990-30 September 1991, and 1 October 1991-31 August 1992, and was rated "good" for the period 1 January 1989- 31 October 1990.

By a memorandum dated 13 May 1993, the Chief, Division of Administration, ESCAP, Bangkok, informed the Applicant as follows:

> "In view of the impending relocation of [the Bangalore] office to New Delhi, I regret to have to advise that your present contract which will expire on 30 June 1993 can not be further extended. In this connection, ESCAP Administration will initiate separation formalities and settle payments due to you as a result of your separation from the Organization.
>
> A new general service staffing table for locally-recruited staff based on requirements at the new location will be established by the Director of APCTT and approved in consultation with appropriate offices of ESCAP secretariat. Once the requirements for local staff for the New Delhi office have been established, vacancy announcements will be circulated and you may apply, as appropriate, if you wish to relocate to that city at your own cost."

On 30 June 1993, the Applicant separated from the Organization, at the expiration of his fixed-term appointment. On the same date, the ESCAP/APCTT office in Bangalore was closed.

On 5 July 1993, the office of ESCAP/APCTT, New Delhi, issued a vacancy announcement (No. 93-13-APCTT-XB-ND5/6) for the General Service post of "Junior Technical Assistant/Technical Clerk" for which the Applicant applied. No vacancy announcement was issued for the post of Publication Clerk, the position that the Applicant had held in Bangalore.

On 29 July 1993, the Director, ESCAP/APCTT wrote to the Applicant, inviting him for a "personal discussion" on 12 August 1993 with regard to his application for the post of Junior Technical Assistant/Clerk. The Applicant was among the candidates chosen to be interviewed by the Selection Committee, which short-listed and selected five candidates. The Applicant was not among them.

On 27 August 1993, the Applicant wrote to the Chief, Division of Administration, ESCAP, Bangkok, requesting "a thorough and impartial enquiry into the entire recruitment procedures adopted by [ESCAP/]APCTT" and, specifically, into the decision not to select him for the post in question.

On 24 September 1993, the Chief, Division of Administration, ESCAP, Bangkok, replied to the Applicant indicating that:

> "... the organizational structure and the staffing of APCTT in New Delhi is not designed to replicate the structure which grew up over many years in Bangalore. This move has afforded us a unique opportunity to reflect on what we do, and how we do it, and to look forward to a new era for APCTT while at the same time trying to evolve a structure and modus-operandi which will enable the Centre to accomplish those things which it should continue to do, differently and better. The production of the Asian-Pacific Tech Monitor is one of the elements which will need to be done differently - not as the full-time assignment of one staff member. In comparing your candidacy for a post of Technical Assistant it was found that you were definitely capable in terms of the production of publications but were not assessed to be as strong in the more important substantive aspects of the job requirements."

On 9 October 1993, the Applicant wrote to the Secretary-General seeking administrative review of the decision not to select him for the Junior Technical Assistant post in New Delhi.

On 13 December 1993, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 28 March 1995. Its considerations and recommendation read, in part, as follows:

> "...
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> 16. The Panel considered that the vacancy announcement for the post of Junior Technical Assistant at APCTT's new office in New Delhi (a) was issued just five days after the Appellant's fixed-term appointment had expired and (b) appeared to include duties which were similar to those performed by the Appellant when serving as Publication Clerk in Bangalore. The Panel further considered that, according

to the 13 May 1993 memorandum from the Chief, Division of Administration, ESCAP, Bangkok, the Appellant's fixed-term appointment had not been extended 'in view of' the relocation of the office of APCTT from Bangalore to New Delhi. At that time, he had been advised that vacancy announcements for locally-recruited staff would be circulated based on the requirements at the new location, and he could apply for such vacant posts provided he was willing to relocate to New Delhi at his own expense.

17. Although the Appellant thus was no longer a staff member at the time he applied and was considered for the Junior Technical Assistant post, and the decision which he was challenging did not appear to be connected to the terms and conditions of his prior fixed-term appointment, the Panel considered (a) the relocation of the office of APCTT to New Delhi, (b) the close proximity between the time of the expiration of the Appellant's appointment as Publication Clerk and the issuance of the vacancy announcement for the Junior Technical Assistant post, and (c) the similarity between the two posts, to create a 'special situation' under which the merits of the Appellant's case should be examined.

18. The Panel next addressed the merits of the appeal, i.e, the Appellant's contention that the decision not to select him for the Junior Technical Assistant post 'was motivated by extraneous factors' and was taken in disregard of staff regulation 4.4. ...

19. The Panel was informed that the Vacancy Announcement for the Junior Technical Assistant post in New Delhi elicited 32 applications, and that the Appellant and fourteen other candidates were contacted to be interviewed. The Selection Committee subsequently short-listed and selected five candidates, and did not select the Appellant.

20. Although the Panel could understand the Appellant's view that he was a suitable candidate for the Junior Technical Assistant post given his above average ratings while performing what appeared to be similar duties as Publication Clerk in Bangalore, the Appellant did not submit concrete evidence to demonstrate that 'extraneous factors' or improper motivation influenced the selection process for filling this vacant post. The Panel concluded, therefore, that the Appellant had not met the requisite burden of proof by providing evidence to substantiate [his claim] that the Selection Committee or APCTT considered 'extraneous factors'

> or was improperly motivated when considering his candidature and making its selection for the Junior Technical Assistant post.
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> ...
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> Recommendation
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> 22. Based on the foregoing considerations, the Panel makes no recommendation in support of the subject appeal."

On 7 April 1995, the Under-Secretary-General for Administration and Management informed the Applicant as follows:

> "The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's conclusion that you did not meet the requisite burden of proof by providing evidence to substantiate that the Selection Committee of APCTT considered extraneous factors or was improperly motivated when considering your candidacy and making its selection for the Junior Technical Assistant post; and, that the Board made no recommendation in support of your appeal. The Secretary-General has, therefore, decided to take no further action on your case. The Secretary-General wishes to confirm that you will receive full and fair consideration, along with other applicants, for future vacancies for which you apply and are found to be qualified."

On 12 January 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contention is:

The decision not to select the Applicant for the post of Junior Technical Assistant in new Delhi was motivated by prejudice and other extraneous factors.

Whereas the Respondent's principal contention is:

The decision not to select the Applicant for the post in question was within the discretion of the Secretary-General and was not motivated by prejudice or other extraneous factors.

The Tribunal, having deliberated from 17 July to 1 August 1997, now pronounces the following judgement:

I. The Applicant was serving as a Publication Clerk in the Economic and Social Commission for Asia and the Pacific/Asian and Pacific Centre for Transfer of Technology (ESCAP/APCTT) when he was informed by the Chief, Division of Administration, that his contract would not be extended since the office was moving to New Delhi. He was invited to apply for a position in the new office if he would be willing to relocate to New Delhi. The Applicant applied for the post of "Junior Technical Assistant/Technical Clerk", for which he was interviewed. The Selection Committee short-listed five candidates, but did not include the Applicant on the list.

II. The Tribunal's task is to determine whether the Respondent's decision not to appoint the Applicant to the above-referenced post was a proper exercise of his discretion or whether this decision was vitiated by prejudice or other extraneous factors. The Tribunal notes that the burden of proof in matters where prejudice or discrimination is alleged rests upon the Applicant (Cf. Judgements No. 554, Fagan (1992); No. 553, Abrah (1992); No. 312, Roberts (1983) and No. 428, Kumar (1988)). The Applicant asserts that the Selection Committee was manipulated by the then Acting Director of APCTT, who was motivated by extraneous factors in evaluating the Applicant's candidacy. By his own admission, the Applicant has not produced "hard evidence" to substantiate his claim.

III. The Tribunal has reviewed the material before it, including the Applicant's personnel files, and cannot conclude that extraneous factors or improper motivation were involved in the Selection Committee's decision. The Tribunal notes that the Selection Committee, which is a body established to conduct a procedure preliminary to that of the Appointment and Promotion Committee,

documented the selection criteria. It called 15 candidates for an interview. Based upon their "qualifications, experience, knowledge of languages, the current needs of APCTT and their performance during the personal discussion ...", it short-listed five of these candidates "as most suitable for appointment and placed in the order of merit ..." The Applicant was not among them. In response to a question put by the Tribunal, the Respondent informed the Tribunal that the Selection Committee "is not a body equivalent to the Appointment and Promotion Committee ... but normally represents a procedure preliminary to that of the Appointment and Promotion Committee carried out by a selection committee, team, panel or ad hoc group ... there is no fixed number of members of the selection committee, which normally comprises the head of office and one or two officers and/or consultant(s) ..." In the light of the foregoing, the Tribunal cannot accept the Applicant's argument that the Selection Committee was not properly constituted and was therefore prejudicial to his interests. Further, the Tribunal concurs with the JAB that the Applicant has not sustained the burden of proving the existence of improper motivation or extraneous factors in the selection process and, therefore, his claim must fail.

IV. The Tribunal is sympathetic to the fact that the Applicant sincerely believes himself deserving of this post. It has noted that the Applicant's performance evaluation reports have consistently assessed his performance as "very good" or "good" and that he has received a number of complimentary letters for a job well done. Nonetheless, the Tribunal may not substitute its judgement for that of the Secretary-General, in the absence of evidence showing bias, prejudice, improper motivation or extraneous factors, which the Tribunal has not found in this case.

V. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Mikuin Leliel BALANDA
Vice-President, presiding

Mayer GABAY
Member

Julio BARBOZA
Member

Geneva, 1 August 1997

R. Maria VICIEN-MILBURN
Executive Secretary